No. 81-1921

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In the Supreme Court of the United States

October Term, 1981

NORTHERN NATURAL GAS COMPANY, NORTHERN HELEX COMPANY, and NORTHERN GAS PRODUCTS COMPANY, *Petitioners,*

v.

MOBIL OIL CORPORATION, ET AL., and RALPH GROUNDS, ET AL., *Respondents,*

AND

UNITED STATES OF AMERICA, *Intervenor.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO MEMORANDUM FOR THE UNITED STATES NOT OPPOSING PETITION FOR WRIT OF CERTIORARI

DEAN WALLACE
PATRICK J. McCARTHY
2223 Dodge Street
Omaha, Nebraska 68102

and

*MARK H. ADAMS, II
ADAMS, JONES, ROBINSON AND MALONE, CHARTERED
301 American Savings Building
200 N. Main
P.O. Box 1034
Wichita, Kansas 67201

Attorneys for Northern Natural Gas Company, Northern Helex Company, and Northern Gas Products Company

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

STATEMENT 1
DISCUSSION 4

Table of Authorities

CASES

Barby v. Cabot Corporation, 465 F.2d 11 (10th Cir. 1972) 7
Chandler v. Judicial Council, 398 U.S. 74 (1970) 5
Hillyer v. Pan American Petroleum Corporation, 348 F.2d 613, 623 (10th Cir. 1965) 9
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 6
Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974) 10
Reece v. Georgia, 350 U.S. 85 8
Texas Industries, Inc. v. Radcliff Materials, Inc., ... U.S. ....., 68 L.Ed. 2d 500 (1981) 9, 10
Washington v. Fishing Vesell Ass'n, 443 U.S. 658 8
Wolfe v. Prairie Oil & Gas Co., 83 F.2d 434 (C.A. 10, 1936) 9

RULE

Rule 22, Fed. R. Civ. Proc. 1

STATEMENT

Although the United States in its Memorandum professes no opposition to this petition for certiorari, Petitioners discern a misapprehension of the basic facts in the Memorandum and, therefore, file this Supplemental Brief for the purpose of restatement and to express their disagreement with factual and legal conclusions expressed in the Memorandum, lest they be assumed to be correct.

The United States contracted with Petitioners to purchase the helium in their gas stream, *not* because it had not been able to undertake, due to shortness of time, extensive title checks to determine what interests, if any respective landowners and lessee-producers might have in the commingled helium, latter day implications by the United States to the contrary notwithstanding (U.S. Memo, p. 2). *Rather it did so because the Bureau of Mines believed that Petitioners owned the full gas stream including the helium therein* (J.A. A674).

Petitioners themselves adhered to their belief that they owned the helium, joined in by the United States which contracted with them. The interpleader action Petitioners instituted was *in the nature of interpleader*, not a mere stakeholder's action (Rule 22, Fed. R. Civ. Proc.), the Government's implication now to the contrary notwithstanding (U.S. Memo, p. 3). Petitioners claimed the entire fund, not just part of it.

The district court, at the first trial, recognized this, when it held:

> "The helex group, comprising three pipeline companies and their subsidiary or parent companies, and Phillips Petroleum Company each assert that helium did in fact pass under the oil and gas leases to the lessee-producer, that it passed further under the gas purchase contracts, and that it was theirs to separate out

from the natural gas stream in their possession and sell to the United States. *The United States concurs in this position.*" (J.A. A172) (Emphasis supplied)

In further expostulating the position of the Petitioners, the district court held:

"Accordingly, the pipeline companies, Cities Service Gas, Northern Natural and Panhandle have asserted counterclaims against the lessee-producers on their warranties of title in contracts with pipeline companies contingent upon the recovery by the producers of the funds.

"These claims are twofold: *First, it is asserted that warranties of title in the parties' gas purchase contracts extend to the full gas stream, and that if only the hydrocarbon portion passed thereunder, the lessee-producers must respond to the purchasers for breach of warranty respecting the balance of the stream. Alternatively, pipeline companies seek recovery from each of the lessee-producers of that percentage of all payments made under the gas purchase contracts which the volume of combustible constituents including helium bears to the volume of the total stream.*

"These counterclaims are founded upon the identical gas purchase contracts under which the lessee-producers claim the fund. They arise out of the 'transaction . . . that is the subject matter of the opposing party's claim,' or they relate to property that is the subject matter of the original action. We conclude that these counterclaims are permissible under Rule 13, insofar as they affect the rights of the parties to participate in the fund." (J.A. A204) (Emphasis supplied)

Petitioners owned the full stream including the helium because Northern Natural Gas Company had purchased the full stream including the helium under gas purchase

contracts with the producers. Irrespective of F.P.C. regulation, the contracts so held, and still so hold (J.A. A296, A298). Even the court of appeals agreed that the contracts with the producers covered the full gas stream including the helium (J.A. A153, A158), but then erroneously held that ordinary contract law did not apply, and that liability was established under and by virtue of Section 11 of the Helium Act Amendments (J.A. A167).

Moreover, the contract price in Petitioners' contract with the United States did *not* contain a component of $2.00 per mcf of extracted helium to compensate the Petitioners for any costs incurred in obtaining title to the helium notwithstanding a statement to the contrary by the United States (U.S. Memo, pp. 2-3).

At the first trial of this case, in findings never reversed, the district court held:

> "Negotiations . . . led ultimately to execution of contracts with their respective helium extraction subsidiaries: with Helex (now Northern Helex, Inc.) on August 15, 1961 . . . (J.A. A235)
>
> * * *
>
> "The prices stated in the contracts apply only to the volumes of helium *contained in* the helium-gas mixture, and not to the mixture itself. (Emphasis in original)
>
> "The contract with Helex, Inc., provided for an *initial unit price of $11.24 per Mcf for helium contained in the crude helium gas mixture delivered to the United States.* Northern Helex produces this helium mixture in a plant at Bushton, Kansas, on pipelines of Northern Natural leading from the Hugoton area, commencing operations in December, 1962. (J.A. A237) (Emphasis supplied)
>
> * * *

"The United States negotiated the above unit prices in each contract on the basis of costs comparable to those it would incur in a government-owned plant located at the same place and in the same circumstances, adding thereto those costs of doing business applicable only to private industry, the cost of taxes, insurance and a return on private capital. As one of the costs of operating a government-owned plant, the United States included in its cost build-up a payment of $2.00 for helium contained in natural gas delivered at the extraction plant for processing. *This* separation of two dollars of the unit price *as applicable to the cost of helium contained in natural gas to be processed for its extraction does not appear in any contract itself. It appears only in evidence which reflects the manner in which the United States reached its own cost estimates to form a basis for actual contract negotiation. The figure reflects no more than the estimate of the Bureau of Mines of the cost it would probably incur, in the operation of its own extraction plant, to acquire helium extraction rights from a natural gas stream.*" (J.A. A238-239) (Emphasis supplied)

For the rest, Petitioners adhere to their factual statement set forth in their Petition.

DISCUSSION

(1) The United States agrees with Petitioners that the concerns they have raised regarding the propriety of the court of appeals' unannounced use of an "abatement" procedure are not frivolous, in light of fundamental notions of notice and fair play. But, because its interests were not prejudiced thereby, it does not support Petitioners (U.S. Memo, p. 7). However, the characterization used by the United States to distinguish this issue, i.e.,

"abatement" is too simplistic and may cloud the real questions raised in this issue.

The judgment on remand in this case was appealed to the court of appeals, where it was argued and submitted to the court *en banc* in 1976. Thereafter, nothing nothing whatsoever happened in this case still pending before the *en banc* court to which it was submitted until in May 1981, the *en banc* panel which had taken the case into its bosom was, without explanation, terminated, and the case reassigned to a three-judge panel. Petitioners adhere to their position that a case, once submitted, may not, commensurate with fundamental notions of notice and fair play, be taken away from that court and assigned to another. Moreover, a substantial question of constitutional authority is inherent in this practice. Witness the extraordinary proceedings documented in *Chandler v. Judicial Council,* 398 U.S. 74 (1970), dealing, of course, with the authority of the Judicial Council to manage the administration of the business of the district judges in the circuit. This Court never reached the Constitutional question, because Judge Chandler had not made out a case for mandamus or prohibition. But it is clear that the Court was troubled by the prospect of taking cases away from the judge who had heard them, but had not decided them for prolonged periods of time. This case was *submitted* to the *en banc* court, and almost five years later that court was terminated and the case taken away and assigned to a three-judge panel.

Likewise, the "abatement" itself was without any authorizing court rule, was not even contemplated by rule, or prior practice to the best of Petitioners' knowledge after assiduous review of the case law. Most weighty of all, in its impact upon Petitioners' rights, was the fact, however, that the "abatement" was used for the real purpose of developing "guidelines" for final determination

of the factual issues in this case in other litigation to which Petitioners were not parties. The problem, really is that Petitioners were never advised that such was the case, but to the contrary *were told that such was not* the case. *The court of appeals in Ashland I expressly refused to extend its holding to this case* (J.A. A438). Thus, Petitioners *were never advised* of the order of abatement, nor of the fact that in the *Ashland* proceedings, were being forged the factual decisions which the court of appeals had decided were to be accorded finality in the determination of "guidelines" *in this case*. Petitioners, although on notice of the existence of the litigation, had been lulled into false security because the court of appeals announced that the *Ashland* proceedings would *not* control. Thus, Petitioners were not afforded the opportunity to take timely action to participate and present their claims or objections in the *Ashland* case.

This is the "abatement" question raised by Petitioners. Essentially, the notice requirement of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 was *not* met and Petitioners were denied due process. It is a violation of due process to use other litigation to bind Petitioners, who, not having been parties, did not have a chance to present their evidence and arguments, upon the basis of authorities cited in the Petition. Material violations of due process are made out by the court of appeals procedure.

(2) The court of appeals, after two laborious trials in district court, and after more than five years of pendency on appeal, suddenly "out of the blue" found that there was a $2.00 helium payment from the United States to Petitioners intended by those parties to benefit lessee-producers under a third-party beneficiary contract theory. This was an issue *never* presented to district court and only raised *for the first time on appeal*. The court's

holding does not jibe with the express terms of the contract between the United States and Petitioners. The court's holding depends upon a factual finding of the intent of the parties with respect to which no district court had been afforded the opportunity to investigate. Intent is a question of fact in Kansas, Texas and Oklahoma, as the court of appeals itself has previously held in this case (J.A. A150). Universally, factual questions are for the district court. The United States apparently concedes the parties included a $2.00 helium cost component in the contract price, but contends there is no evidence they intended it to be for the benefit of third parties. Petitioners agree with the latter, but disagree with the former. Petitioners firmly deny that the parties included any such cost component in the price, and as been shown at length heretofore, the Government's concession is inconsistent with the express findings of the district court at the first trial. In any event, the Government apparently believes that the issue does not warrant consideration by this Court, because it is not novel and because it is a "factual" determination.

However, the novelty is that Petitioners had no opportunity, because of surprise, to present their evidence in district court.[1] In effect, the court of appeals granted summary judgment, despite a material factual dispute, requiring a ruling by the trial court. Proper procedure required submission of the unanswered factual questions to the trial court. Moreover, the duty of the courts is not to rewrite or create a contract, but to enforce the express terms of the contract the parties already have. *Barby v. Cabot Corporation*, 465 F.2d 11 (10th Cir. 1972).

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1. At pages 18-19 of the Petition herein, Petitioners also contend that the $2.00 holding, by not permitting the recoupment of investments, and a fair rate of return, together with all operating costs, is unfair, arbitrary, capricious and confiscatory.

Petitioners' right to due process has been denied them by the judgment of the court of appeals.[2]

(3) The United States, while agreeing with Petitioners that the court of appeals erred in concluding that lessee-producers and landowners are entitled to additional compensation for the helium component of the natural gas stream they already sold, declines to "press the issue once more upon the Court" (U.S. Memo, p. 9). Why not?

When Petitioners' earlier Petition for Certiorari was denied in 1972 (with Justices Blackmun and Stewart voting to grant certiorari, and Justice Powell taking no part) 404 U.S. 1063, liability only was dealt with and the matter was interlocutory. Now on the valuation phase of the litigation, the matter clearly is no longer interlocutory. Denial of the former petition should not be treated as a final adjudication. *Washington v. Fishing Vessell Ass'n,* 443 U.S. 658. In the review requested, this court should consider all of the substantial federal questions determined in the earlier litigation. *Reece v. Georgia,* 350 U.S. 85.

In such a review, this Court should be advised that it has been held in this litigation that the gas purchase contracts, under which Petitioners purchased the full gas stream from the producers, included the helium component, and that in having determined Petitioners are *nevertheless liable* under quantum meruit for the reasonable value of the helium content of the gas stream, the court of appeals has taken Petitioners' contract rights

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2. Potential liability of the taxpayers also arises from the judgment of the court of appeals because of the conjunction of prejudgment interest, allowed erroneously by the court, and the $2.00 judgment. This contingency must be viewed in light of the indemnification commitment of the United States in its contract with Petitioners which will be triggered by a judgment in excess of about $3.00. The three Helex Companies in the *Grounds* case sold about 20,000,000 mcf of helium to the United States.

away from them without due process of law. If the F.P.C. had no jurisdiction to effect a change in the contract price covering the helium content because of the Helium Act Amendments, how could this result in the entitlement of lessee-producers to compensation in addition to that provided by their contracts? To the contrary, if no jurisdiction could be exercised by the F.P.C., the contracts must logically remain in full force.[3] Even if lessee-producers are otherwise entitled to a quantum meruit determination of reasonable value for the helium component, the universal rule is that there can be no implied contract in the face of an express contract. *Hillyer v. Pan American Petroleum Corporation*, 348 F.2d 613, 623 (10th Cir. 1965); *Wolfe v. Prairie Oil & Gas Co.*, 83 F.2d 434 (C.A. 10, 1936).

With no apology whatsoever, Petitioners respectfully request this Court to reconsider its earlier denial of the substantial federal questions raised before.

(4) The United States says that it is not entirely clear that the court of appeals erred in applying federal law to construe the contracts at issue in this litigation (U.S. Memo, p. 10). What the court of appeals held was that federal common law required the imposition of prejudgment interest despite the fact that the law in the states where the natural gas is produced from which this helium is extracted (as well as the forum state) is *uniformly* that prejudgment interest is not allowed unless the amount in controversy is liquidated (See authorities in Petition). But this court held in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, ... U.S. ....., 68 L.Ed. 2d 500 (1981) that federal common law, in the absence of some "congressional authorization to formulate substantive rules

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3. Necessarily, by its very terms, if it has any impact on this case at all, Section 11 impacts *only* upon Federal Power Commission jurisdiction over the contracts, not upon the contracts themselves.

of decision, . . . exists only in such narrow areas as those concerned with the rights and obligations of the United States. . ." (p. 509 of L.Ed. 2d). Notwithstanding the argument of the United States (U.S. Memo, pp. 10-11), it has not shown (nor can it show) how its rights and obligations are advanced by the imposition of federal common law in this case. The United States is but a nominal party herein. If it is concerned relative to the triggering of its indemnification obligations under its contract with Petitioners, logically it should join hands with Petitioners in *protesting* the court-ordered preemption of state law by federal common law in this case, because a judgment allowing prejudgment interest will go further toward triggering indemnification than one that does *not* do so. Moreover, despite the importuning of the United States (U.S. Memo, pp. 10-11), the fact that there is federal subject matter jurisdiction under the Interpleader Statute is beside the point. "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." (*Texas Industries,* supra, p. 509 of L.Ed. 2d). Even a treble-damages action under the Sherman Act remains a private suit involving the rights and obligations of private parties. (*Texas Industries,* supra, p. 510 of L.Ed. 2d). Here, under the force of the well-considered opinion in *Phillips Petroleum Co. v. Texaco, Inc.,* 415 U.S. 125 (1974), this is simply a suit for reasonable value in an action in quantum meruit whose source *is state law* not federal law. If that decision means anything, it means that there is no room for the imposition of federal common law in this case. Here there is *no* uniquely federal interest justifying the imposition of federal common law and the preemption of state law.

The Petition for Certiorari should be granted.

Respectfully submitted